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Attorney for Plaintiff, ARCO INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCO INDUSTRIES, INC.,

Plaintiff,

v.

NEW YORK WINE CO. LLC,
ROBERT ALLEN, and,
DERRICK MIZE

Defendants

Case No. 1:08-cv-01999-PKC

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiff ARCO INDUSTRIES, INC. d/b/a New York Wine Warehouse, New York Wine Storage Company and NYWINES (hereinafter “NYWINES”) for their complaints against Defendants NEW YORK WINE CO. LLC, ROBERT ALLEN, and DERRICK MIZE (collectively hereinafter referred to as “Defendants” and as more fully identified below) states and alleges as follows:

NATURE OF ACTION AND RELIEF SOUGHT

1. This action arises out of Defendants’ willful and blatant violation of NYWINES’ intellectual property rights, and specifically in violation of the Lanham Act,

and New York State law. Defendants, who for reasons set forth herein, should have been fully aware of NYWINES' rights in its trademarks, assumed name, and wide spread use of its names, did unlawfully adopt a confusingly similar name for their wine shop, to the detriment of NYWINES.

2. Defendants are infringing NYWINES' valuable trademarks and domain name. They are causing confusion, tarnishing, denigrating, and diluting the distinctive quality of the NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY brands, and further causing confusion by adopting and using a domain name that is virtually identical to NYWINES – NYWINES.COM v. NYWINECO.COM. These acts are misleading the public and diminishes the valuable good will painstakingly developed by NYWINES and represented by the NEW YORK WINE WAREHOUSE, NEW YORK WINE STORAGE COMPANY and NYWINES brands.

3. NYWINES has not granted Defendants a license to use its well-known trademark. Despite having full notice of NYWINES' established rights in the NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY marks by virtue of the Federal incontestable trademark registrations, along with its well and long established domain name NYWINES.COM, Defendants are using NEW YORK WINE CO and NYWINECO.COM in the name of its business, on its website, in advertising and promotional materials directed at the same consumers, class of consumers, in the same geographic area as NYWINES. As more fully set forth herein, the consuming public is immediately associating Defendant's use of NEW YORK WINE CO and NYWINECO.COM with that of NYWINES.

4. Defendants have engaged in dilatory tactics since October 12, 2007 when Defendants received a cease and desist letter from NYWINES placing them on notice of their violation of NYWINES' rights. Finally, on January 30, 2008, three and a half months after receipt of the NYWINES' complaint, and after making all conceivable efforts to avoid NYWINES' claims, counsel for Defendants rebuffed NYWINES' complaint and request for immediate cessation of all confusingly similar marks. The essence of Defendants justification for ignoring NYWINES' complaint is that despite NYWINES' prior use, and registration of its marks, Defendants are free to copy and imitate the marks without infringing the intellectual property rights of NYWINES. The position taken by Defendants is entirely inconsistent with the specific provisions of the Lanham Act, and the well established principals of trademark law.

5. This is an action for trademark infringement, unfair competition, false designation of origin, false advertising and misappropriation of a domain name, arising under the Trademark Act of 1946, 15 U.S.C. §§1051, *et. seq.*, as amended (the "Lanham Act") and for deceptive trade practices under the laws of the State of New York (GBL §349) and unfair competition under the common law of New York.

PARTIES AND BACKGROUND

6. NYWINES is a corporation organized and existing under the laws of the State of New York, having its principal place of business in Long Island City, Queens, New York.

7. Liquor license L-03710 was granted to NYWINES, effective January 23, 1992. The exact name of the license holder is listed on the license as Arco Industries, Inc. d/b/a N Y Wine Warehouse.

8. NYWINES is and has been in the wine business since the grant of its license. It owns and operates a retail wine and liquor shop, a wine storage company, an interactive website at NYWINES.COM and is actively engaged in the wine auction business through its relationship with Christies, Inc.

9. NYWINES is very well known in the wine industry inside and outside of this district because of its specialization in fine and rare wines. It has developed a worldwide reputation where people specifically know to come to NYWINES when they are seeking specialty and rare wines. As a fully licensed wine and spirits retail store, NYWINES also carries a full line of products accommodating the variegated needs of its customers.

10. NYWINES owns incontestable trademark registrations for its trademarks NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY, Registration Nos. 2392991 and 2395149, respectively and attached as Exhibits 1 and 2.

11. NYWINES first registered the domain name NYWINES.COM on August 7, 1995, and has actively used NYWINES.COM since December 1995.

12. On or about February 24, 2006, Defendants formed the legal entity NEW YORK WINE CO., LLC in the State of New York.

13. On or about March 1, 2006, Robert Allen registered the domain name NYWINECO.COM in his own name.

14. Upon information and belief, Defendants have their principal place of business in Manhattan, New York City.

15. Upon information and belief, nearly a year after creating a legal entity, and obtaining the domain name, Defendants opened its store in New York City.

16. Upon information and belief, defendant Robert Allen is an owner and principal of NEW YORK WINE CO. LLC.

17. Upon information and belief, defendant Derrick Mize is an owner and principal of NEW YORK WINE CO. LLC.

JURISDICTION AND VENUE

18. Upon information and belief, the acts complained of herein, were carried out by each of the Defendants within this judicial district.

19. This Court has subject matter jurisdiction over the claims alleged under the Lanham Act pursuant to 15 U.S.C. §1121, 28 U.S.C. §§ 1331, 1338(a), 1338(b) and the principles of pendant jurisdiction.

20. This Court has personal jurisdiction over Defendants in that Defendants do business in this district, its principal business establishment is located in this district, and operate a website accessible in this district, and engage in the promotional activities alleged herein throughout this district in violation of the Lanham Act.

21. This court has personal jurisdiction over each of the Defendants pursuant to C.P.L.R. §§ 302(a) et. seq. because Defendants have committed tortious acts both within and without the State of New York, is causing injury to plaintiff NYWINES within the State of New York, and Defendants are regularly conducting and soliciting business within the State of New York.

22. Venue is proper in this district by virtue of 28 U.S.C. § 1391(b).

FACTS APPLICABLE TO ALL CLAIMS

PLAINTIFF NYWINES BACKGROUND

23. Mr. Geoffrey M. B. Troy is a principal of NYWINES and has been in the wine and spirits business for approximately twenty years. Prior to engaging in the wine business he, along with others, developed and published a widely distributed newsletter, The Underground Wine Letter, a critical periodical about rare wines. More than ten thousand (10,000) copies of this newsletter was distributed throughout the United States, and outside the United States for a period of twenty (20) years. Furthermore, he was actively involved in various wine and food societies, including “The Confrérie des Chevaliers du Tastevin,” The New York Wine and Food Society, “The Commanderie de Bordeaux” and “Vingt Six”. He regularly traveled to California and Europe, and was often invited by vintners to sample and comment upon wines in their early stages of development. It was through these affiliations, and his inestimable evaluation of wines that he developed a nationwide if not international recognition within the fine wine industry.

24. In 1991 Mr. Troy decided to open his own wine store which was opened in 1992 and was met with immediate success. It was acclaimed by many industry publications at the time and since. Noting that many people who desired to collect fine wine did not have the cellaring capabilities in their homes and apartments, he developed a unique business model of selling wines through the NEW YORK WINE WAREHOUSE, a New York State licensed wine and liquor store, and then also providing storage for its customers of their purchases through the NEW YORK WINE STORAGE COMPANY. From its early days, it took on rapidly and required the business to expand its facilities

ultimately taking over all available space, both at ground level and underground in order to keep up with the increasing demand of its business. Currently NYWINES rents a total of fifteen thousand seven hundred and forty two (15,742) square feet for its business, much of it racked for maximum cubic foot usage. This is a remarkable accomplishment for such an enterprise located in a metropolitan area, let alone the New York metropolitan market.

25. On August 7, 1995, NYWINES acquired the domain name NYWINES.COM as it was working on creating a website for its business. The initial website was mostly an informational site providing information about the NEW YORK WINE WAREHOUSE and the products it sells. Over the years, as has the Internet, the NYWINES.COM website has developed into a robust and widely visited website by customers and potential customers.

26. NYWINES is the owner of the entire right, title and interest in and to the following federal trademarks:

a. United States Registration No. 2392991 for NEW YORK WINE WAREHOUSE issued on October 10, 2000 for: Retail store services, mail order catalog services, and computerized on-line ordering services all in the field of wine, in International Class 35. A copy of the Certificate of Registration No. 2392991 is attached as Exhibit 1. On December 26, 2006, the Trademark Office accepted the combined Section 8 and 15 affidavits and therefore accorded Registration No. 2392991 incontestable status as provided under Section 15 of the Lanham Act. 15 U.S.C. § 1065.

b. United States Registration No. 2395149 for NEW YORK WINE STORAGE COMPANY issued on October 17, 2000 for: Warehousing services, in International Class 39. The Certificate of Registration No. 2395149 is attached as Exhibit 2. On December 26, 2006, the Trademark Office accepted the combined Section 8 and 15 affidavits and therefore accorded Registration No. 2395149 incontestable status as provided under Section 15 of the Lanham Act. 15 U.S.C. § 1065.

27. NYWINES registered the assumed name of NYWINES on January 23, 2007 with the New York Secretary of State.

28. NYWINES also has a significant alliance relationship with Christies, the internationally acclaimed auction company with offices around the world. Through this relationship, NYWINES has worked with Christies since January 2002 and together they have worked on Fifty-seven (57) auctions selling more than Ninety Million \$90,000,000.00 (dollars) of wine. In connection with each such auction, both physical catalogs are distributed as well as the catalog being completely available online. At present, approximately eleven-hundred twenty auction catalogs are distributed for each auction, and that number was previously larger than it is today. Approximately three quarters of the catalogs are distributed within the United States and of that more than a quarter are distributed within New York state. Each such auction catalog prominently shows NYWINESCHRISTIES on the cover, and includes numerous references to NYWINES as the entity handling the legal licensed logistics of the wine auction. Attached, as Exhibit 3, is a sample of relevant pages from one such printed catalog as well as sample pages from an online catalog.

29. The wine industry popularized this relationship in many different forums and media. For example, the *wineinvestor.com* stated in early 2002: “Christies is the global auction juggernaut covering the world from New York to Hong Kong. ... In 2002 they switched to the boutique New York Wine Warehouse, creating the enterprise NYWinesChristies, which is how all of the auctions are labeled. They also hold auctions in Los Angeles broadening their US footprint.” *Decanter.com* said on January 3, 2002 “Christie’s in New York has chose as its new associate a purveyor of blue-chip and boutique wines based in Long Island City, just across the East River from Manhattan. The new associate is the New York Wine Warehouse, whose president, Geoffrey Troy, is well known among collectors of fine and rare wines ... The new arrangement will be known as NYWinesChristies, the auction house’s North American Wine Department said today. Richard Brierley, head of the department, called the New York Wine Warehouse ‘a well-respected player in the North American Wine Market.’” Heralding the success of this relationship, the New York Times said: “[t]he inaugural auction under the NYWinesChristie’s rubric in Manhattan was a clear success, with 97% of 646 lots sold for \$2,291,432 ... on 8 March.”

30. NYWINES has been listed each year since 2005 in the annual ZAGAT New York City Gourmet Shopping & Entertaining guide and in the 2008 edition it states: “[A]n ‘extraordinary secret resource’ that will ‘sell, deal, auction, store, catalog and deliver’ wines for knowledgeable oenophiles; its 10,000 labels (including a deep selection of Burgundies) make it a favorite of collectors ...”.

31. Additionally, over the years NYWINES has been quoted, mentioned or otherwise discussed in leading publications, including: The New York Times, Newsday,

The Sun, Bloomberg as well as industry publications including Decanter and the Wine Spectator. Suffice it to say, within the wine industry, and certainly the wine industry in the New York metropolitan area, NYWINES is well known, highly regarded, and well established and clearly recognized by the industry and consumers.

DEFENDANT NEW YORK WINE CO., LLC BACKGROUND

32. As stated above, Defendants formed the legal entity NEW YORK WINE CO., LLC in the State of New York. Defendants named their store NEW YORK WINE CO as shown in the attached photographs in Exhibit 4 consisting of their store located at 21 Warren Street, New York City. The attached photographs show the front of defendant's store and their prominent use of NEW YORK WINE CO.

33. As stated above, Defendants acquired the domain name NYWINECO.COM and are actively using it to promote their business. Attached as Exhibit 5 are several pages from Defendant's website clearly demonstrating that they are using NEW YORK WINE CO and the domain name NYWINECO.COM to actively market and promote their wine store. Moreover, it is patently clear from the third page of Exhibit 5, that Defendants are targeting their business at the very same consumers who collect rare wines as does NYWINES but having a "Collector's Club" which costs three hundred sixty (\$360.00) dollars to be a member of. There is no doubt that Defendants' targeted customers are the same as those of NYWINES.

34. Attached, as Exhibit 6 is copy of the October 2007 New York Yellow Pages telephone directory showing that the NEW YORK WINE CO is listed immediately prior to NEW YORK WINE WAREHOUSE. Upon information and belief, in each edition of the New York Yellow Pages telephone directories from 1992 through the

edition shown in Exhibit 6, New York Wine Warehouse was the only company listed beginning with New York Wine.

35. As can be readily seen from the foregoing exhibits Defendants are using NEW YORK WINE CO and NYWINECO.COM extensively in their advertising and promotional efforts.

36. Each of NYWINES' trademark registrations, NEW YORK WINE WAREHOUSE, and NEW YORK WINE STORAGE COMPANY, are at issue here and are incorporated within Defendants' use of NEW YORK WINE CO.

37. NYWINES's domain name is NYWINES.COM while Defendants domain name is NYWINECO.COM. Defendants have dropped the letter "S" and added "CO" in its place. This is an insubstantial difference between the two domain names particularly since "CO" is the well known and commonly used abbreviation for "Company".

38. Defendant Robert Allen is a 1999 graduate of the Culinary Institute of America. NYWINES has been an active member of the corporation and fellow of the Culinary Institute of America since 1992. As such, NYWINES has been an identified resource to students of the Culinary Institute of America, as well as being listed in newsletters and "Mis En Place," a publication of the Culinary Institute of America. One of the goals of the Culinary Institute of America is to connect its students with leading members of the culinary world, which NYWINES is an active participant in. Suffice it to say, NYWINES is well recognized at the Culinary Institute of America, and given this long association predating one of the Defendant's enrollment, is further notice to Defendants of NYWINES adoption and use of its valuable trademarks.

39. Given the long, uninterrupted and exclusive use of NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY, and the extensive advertising and promotional activities engaged in by NYWINES, Defendants, would have surely been aware of, and knew of NYWINES, all in advance of having selected NEW YORK WINE CO and NYWINECO.COM. Defendants had constructive notice of NYWINES' intellectual property rights by virtue of its incontestable federal trademark registrations. Given the numerous advertising, marketing, publicity, and support of a significant educational institution, Defendants are presumed to have had notice of the existence, and use of NYWINES trademarks.

40. The use of NEW YORK WINE CO by Defendants is virtually identical to NYWINES's NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY except for the omission of "WAREHOUSE" and "STORAGE". When encountering NEW YORK WINE CO, a consumer will readily associate the mark and the name of the business with NYWINES.

41. Both NYWINES and Defendants are engaged in essentially the same business, in the same geographic market area, and direct their activities to the same class of consumers. On its website NYWINECO.COM, Defendants state: "New York Wine Co. has both a conspicuous passion for the classic wines of Europe and a loyalty to quality wines from the world's other notable regions. Our own personal curiosity about wine keeps New York Wine Co.'s selection frequently changing, and our devotion to a wine's characteristics of terroir focuses our selection on producers that create a sense of place. No matter if you're looking for everyday drinking wines, undiscovered specialties,

or rare trophy vintages, New York Wine Co.'s warm, enthusiastic approach to wine will suit your tastes.”

42. Shortly after learning of Defendants’ adoption and use of NEW YORK WINE CO, NYWINES’ counsel contacted Defendants with a cease and desist letter requesting Defendants to immediately change their name, and turn over their domain to NYWINES, among other things.

43. For a period of more than three (3) months, counsel for Defendants kept stalling counsel of NYWINES stating that either he was too busy, or that his client was too busy to respond substantively to NYWINES’ demands. Then finally, after three and a half months, different counsel for Defendants responded by rebuking the claims made by NYWINES. See, Exhibit 7.

44. Upon information and belief, Defendants have knowingly and willfully adopted NEW YORK WINE CO despite full knowledge of the existence and registration of NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY by NYWINES.

45. Upon information and belief, Defendants have knowingly and willfully adopted the domain name NYWINECO.COM despite full knowledge of the existence and registration of the domain NYWINES.COM by NYWINES.

46. Defendants have performed the aforementioned acts without permission or authority from NYWINES and without legitimate license to reproduce, promote, manufacture, offer for sale, sell and/or distribute products or engage in such activities.

47. Upon information and belief, unless enjoined by this Court, Defendants intend to continue their course of conduct and wrongfully reproduce, promote,

manufacture, offer for sale, sell and/or distribute products or engage in promotional activities utilizing NEW YORK WINE CO and NYWINECO.COM despite NYWINES's ownership of the federally registered incontestable marks NEW YORK WINE WAREHOUSE and NEW YORK WINE STORAGE COMPANY and the domain name NYWINES.COM. As a direct and proximate result of the acts of Defendants alleged herein, NYWINES suffers irreparable damage and injury. NYWINES may have no adequate remedy at law to redress the injuries Defendants have caused and will continue to cause by their conduct. NYWINES will continue to suffer irreparable damage, injury, and lost profits unless this Court enjoins Defendants.

FIRST CLAIM FOR RELIEF
(Federal Trademark Infringement)
(15 U.S.C. § 1114)

48. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 47 of this Complaint as if fully set forth herein.

49. NYWINES is the owner of the Federal Trademark Registrations identified in Paragraph 26 of this Complaint as well as the assumed name NYWINES identified in Paragraph 27 of this Complaint, and the domain name NYWINES.COM identified in Paragraph 25 of this Complaint. The NYWINES trademarks, assumed name, and domain name have acquired substantial goodwill and secondary meaning.

50. Defendants have adopted and are using NEW YORK WINE CO and NYWINECO.COM in a manner that is likely to cause confusion, is causing confusion, mistake and deception among the general purchasing public as to the origin and affiliation of Defendants with NYWINES. Defendants are likely to deceive the public into believing that the NEW YORK WINE CO and NYWINECO.COM originates from,

is associated with, or is otherwise authorized by NYWINES, all to the damage and detriment of NYWINES's reputation, goodwill, and profits.

51. Defendants have unlawfully and wrongfully derived, and will continue to unlawfully and wrongfully derive, income and profits from these infringing acts, and NYWINES has sustained and will continue to sustain substantial injury, loss and damage in an amount according to proofs at the trial of the within suit.

52. Defendants use of one or more of NYWINES's trademarks on or in connection with the sale of products and promotion of its retail store constitutes willful and deliberate infringement of NYWINES's trademarks, without authorization or consent in violation of §32 of the Lanham Act, 15 U.S.C. §1114.

53. Defendants' acts of willful infringement have caused and will continue to cause NYWINES irreparable harm and injury to its goodwill and reputation unless this Court enjoins such conduct. NYWINES may have no adequate remedy at law. Thus, Defendants should be restrained and enjoined pursuant to 15 U.S.C. §1116.

54. Because of Defendants activities, NYWINES has been damaged in an amount to be ascertained at the trial of the within suit.

SECOND CLAIM FOR RELIEF
(Unfair Competition and False Designation of Origin)
(15 U.S.C. § 1125(a)(1)(A))

55. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 54 of this Complaint as if fully set forth herein.

56. Defendants are manufacturing, distributing, selling and offering for sale in commerce products and promoting its business bearing unauthorized reproductions of trademarks virtually identical to NYWINES' trademarks.

57. By deliberately and willfully using trademarks virtually identical to NYWINES' trademarks, Defendants have consciously and deliberately sought to capitalize on the distinctive quality and recognition of NYWINES' trademarks and have intended to capitalize upon and profit by consumer confusion they have created.

58. Defendants' are knowingly and intentionally misrepresenting and falsely designated to the general public the affiliation, connection, association, origin, source, sponsorship and approval of its competing business, and intends to misrepresent and falsely designate to the general public the affiliation, connection, association, origin, source or sponsorship of its business, so as to create a likelihood of confusion by the public as to the affiliation, connection, association, origin, source and sponsorship of the Defendants and Defendants business.

59. Defendants conduct as alleged is deliberate and willful, is likely to cause confusion, will injure NYWINES' reputation unless enjoined, and constitutes unfair competition and a false designation of origin in violation of §43(a)(1)(A) of the Lanham Act, 15 U.S.C. §1125(a)(1)(A).

60. Defendants wrongfully and unlawfully derived, and will continue to wrongfully and unlawfully derive, income, profits, and benefits from these acts of false designation of origin, and false representation. NYWINES has sustained, and will continue to sustain substantial injury, loss, and damage.

61. Defendants' acts have caused and will continue to cause NYWINES irreparable harm and injury to its goodwill and reputation unless restrained by this Court. NYWINES may have no adequate remedy at law. Defendants should be restrained and enjoined pursuant to 15 U.S.C. §1116.

62. As a direct and proximate result of the foregoing acts of Defendants, NYWINES has been damaged in an amount to be ascertained at the trial of the within suit.

THIRD CLAIM FOR RELIEF
(False Advertising)
(15 U.S.C. § 1125(a)(1)(B))

63. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 62 of this Complaint as if fully set forth herein.

64. Through the use of trademarks that are identical, or virtually identical to NYWINES' trademarks, Defendants are knowingly and intentionally misrepresenting the nature, characteristics, and qualities of its business, and intends to misrepresent the nature, characteristics, and qualities of its business, so as to create a likelihood of confusion by the public as to the nature, characteristics, and qualities of its business.

65. Defendants conduct as alleged is deliberate and willful, is likely to cause confusion, will injure NYWINES' reputation unless enjoined, and constitutes a false advertising in violation of §43(a)(1)(B) of the Lanham Act, 15 U.S.C. §1125(a)(1)(B).

66. Defendants' acts have caused and will continue to cause NYWINES irreparable harm and injury to its goodwill and reputation unless restrained by this Court. NYWINES may have no adequate remedy at law. Defendants should be restrained and enjoined pursuant to 15 U.S.C. §1116.

67. As a direct and proximate result of the foregoing acts of Defendants, NYWINES has been damaged in an amount to be ascertained at the trial of the within suit.

FOURTH CLAIM FOR RELIEF
(Domain Name Infringement)

(15 U.S.C. § 1125(d)(1))

68. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 67 of this Complaint as if fully set forth herein.

69. NYWINES has built up valuable goodwill in its domain name NYWINES.COM.

70. Defendants have in bad faith adopted, registered and used the domain name NYWINECO.COM.

71. NYWINES' federal trademark registrations are distinctive at the time of the registration of Defendants' domain name NYWINECO.COM and is confusingly similar with NYWINES' trademarks.

72. Defendants' adoption and use of the NYWINECO.COM domain name, which is virtually identical to NYWINES' domain NYWINES.COM, was done with the intent to divert consumers from NYWINES' online location for commercial gain to Defendants.

73. The aforesaid acts of Defendants constitutes a domain name infringement in violation of 15 U.S.C. § 1125(d)(1).

74. As a direct and proximate result of the foregoing acts of Defendants, NYWINES has been damaged and has suffered and will continue to suffer immediate and irreparable harm.

75. Defendants should be ordered to transfer the domain name NYWINECO.COM to NYWINES.

FIFTH CLAIM FOR RELIEF
(Deceptive Trade Practices)
(New York General Business Law §349)

76. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 75 of this Complaint as if fully set forth herein.

77. The aforesaid acts of Defendants has deceived, misled and confused the general public and will continue to do so, and constitute deceptive trade practices in violation of the New York Deceptive Trade Practices Act, § 349 of the General Business Law.

78. As a direct and proximate result of the foregoing acts, Defendants unlawfully and wrongfully have derived and will continue to derive, income, profits and ever-increasing goodwill from its activities, and NYWINES has been damaged and has suffered and will continue to suffer immediate and irreparable injury for which there may not be an adequate remedy at law.

79. Because of Defendants activities, NYWINES has been damaged in an amount to be ascertained at the trial of the within suit.

SIXTH CLAIM FOR RELIEF
(New York Common Law)

80. NYWINES restates and incorporates the Allegations of Paragraphs 1 through 79 of this Complaint as if fully set forth herein.

81. The aforesaid acts of Defendants unauthorized use of NYWINES' trademarks, and indications of origin in connection with its competing business constitute unfair competition under the common law of the State of New York in that Defendants

have misappropriated, and unfairly competed with, NYWINES' commercial business and will continue to do so.

82. As a direct and proximate result of the foregoing acts, Defendants unlawfully derived and will continue to derive income, profits and ever-increasing goodwill from its activities.

83. NYWINES has been damaged and has suffered and will continue to suffer immediate and irreparable injury for which there may not be an adequate remedy at law.

84. Because of Defendants activities, NYWINES has been damaged in an amount to be ascertained at the trial of the within suit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff NYWINES prays as follows:

1. That the Court issue a temporary and permanent injunction order restraining, enjoining, and prohibiting Defendants, their agents, servants, directors, employees, officers, attorneys, distributors, retailers, successors, and assigns, and all persons, firms, corporations and legal entities acting in concert with, or in conspiracy with, or affiliated with, or in participation with Defendants or on Defendants' behalf from:

a. Using NYWINES's property, including without limitation NEW YORK WINE CO, NYWINECO.COM on or in connection with its business including in all advertisements, including but not limited to electronic, television, radio and print, promotional activities, by the Internet, on brochures, on signs, on banners, flyers, or any colorable imitation of NEW YORK WINE WAREHOUSE, NEW YORK WINE STORAGE COMPANY, NYWINES.COM,

in connection with the manufacturing, printing, distribution, advertising, offering for sale, or selling any products or services or other items not the products of NYWINES, or in any manner likely to cause others falsely to believe that Defendants' products and services are connected with NYWINES;

b. Passing off, inducing, or enabling others to sell or pass off any products or services which are not authorized, licensed or sold by NYWINES;

c. Committing any other acts calculated to cause purchasers to believe that Defendants' products and services are products and services offered or sold by NYWINES or its valid licensees;

d. Shipping, delivering, distributing, transferring, returning, holding for sale, destroying, or otherwise moving, storing, or disposing of any products, advertisements, promotional materials, offers for sale, and documents, or other items bearing or used in connection with the unauthorized use of NEW YORK WINE CO, NYWINECO.COM by Defendants;

e. Transferring, moving, returning, destroying or otherwise disposing of any equipment, apparatus, computer recorded media, business records or documents all relating or used in connection with the unauthorized use of NEW YORK WINE CO, NYWINECO.COM by Defendants;

2. That the Court issue an order requiring Defendants, agents, or employees, to make all reasonable efforts to retrieve all infringing articles from the stream of commerce, including but not limited to advertising and marketing materials in the distribution channel, and deliver such materials to a place designated by the Court during the pendency of this action;

3. That the Court issue an order requiring Defendants to stop all use of NEW YORK WINE CO, NYWINECO.COM by Defendants, take down all Internet websites featuring or advertising or otherwise using NEW YORK WINE CO, NYWINECO.COM, and to otherwise cease all advertising and promotional efforts of NEW YORK WINE CO, NYWINECO.COM by Defendants;

4. That the Court issue an order requiring Defendants to change the name of their corporation as registered at the New York Secretary of State to a name that is not infringing with NYWINES' trademarks;

5. That the Court issue an order requiring Defendants to transfer to NYWINES the domain name NYWINECO.COM;

6. That the Court grant NYWINES an equitable accounting of Defendants' profits and award NYWINES its attorneys' fees and costs, plus its damages or Defendants' profits, whichever are greater, arising from Defendants' trademark infringement, false designation of origin, unfair competition, and false advertising, such damages or profits to be trebled pursuant to 15 U.S.C. §1117 and otherwise by reason for the willfulness of Defendants' acts;

7. That NYWINES be awarded damages arising from Defendants' trademark infringement and unfair competition;

8. That the Court award NYWINES its costs of suit and its attorney fees incurred herein; and

9. That the Court grant such other and further relief as it deems just and proper.

PLAINTIFF, ARCO INDUSTRIES, INC., DEMANDS TRIAL BY JURY ON THOSE
ISSUES SO TRIABLE

Dated: February 27, 2008

Respectfully submitted:
GORDON E. R. TROY, PC



By: _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCO INDUSTRIES, INC.,

Plaintiff,

v.

NEW YORK WINE CO. LLC,
ROBERT ALLEN, and,
DERRICK MIZE

Defendants

Case No. 1:08-cv-01999-PKC

Exhibit 4



NEW YORK WINE CO.



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Attorney for Plaintiff, ARCO INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCO INDUSTRIES, INC.,

Plaintiff,

v.

NEW YORK WINE CO. LLC,
ROBERT ALLEN, and,
DERRICK MIZE

Defendants

Case No. 1:08-cv-01999-PKC

Exhibit 5



NEW YORK WINE CO.

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**Upcoming Event**

David will lead us through some deep, lush, juicy, intense wines to keep us warm through the last weeks of winter. Accompanying the wines will be a selection of light appetizers. Apply \$50 of your admission price toward a case purchase of wines sampled during the event on top of our regular 10% solid case discount.

"Big Winter Reds with David Lynch"
Saturday, Feb. 16th, 2:00 p.m. \$95 + tax

Featured Wines**Regional Legends**

Sensational new releases from Quintarelli, Fontodi and Billecart-Salmon. Explore the best in bubbles, Sangiovese and Valpolicella.



Fontodi 2004
Flaccianello
\$107.00



Billecart Salmon NV
Blanc de Blancs
\$69.00



Quintarelli 1999
Valpolicella
\$75.00

[View All Regional Legends >>](#)**Staff Picks**

Coste Petrai NV Prosecco Brut
\$14.00

Billecart Salmon NV Brut
\$48.00

Bavard 2005 Bourgogne Blanc
\$20.00

Schaefer 2006 Riesling Classic Dry
\$19.00

Once 2006 Pinot Noir
\$25.00

Ca'Marcanda 2005 Magari
\$58.00

[View All Staff Picks>>](#)**Gift Sets & Glassware**

From the most discerning wine aficionado to the casual merry-maker, the right bottle is an ideal gift. Check out our range of gift sets, as well as our selection of glassware.

**WINE CLUB**

No more wine slumps or bored palettes! Keep your wine rack interesting with New York Wine Co.'s Monthly Wine Clubs.

SPOTLIGHT

Take a more in-depth look at some of the wine world's big tastes, smooth finishes, curious traditions, and delightful innovations. This month, our thoughts on **champagne** bubble up...

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Featured Wines

Regional Legends

Currently featured are three elite and highly collectible producers from three separate winegrowing regions: Champagne, Tuscany, and Veneto. While the wines are vastly different in flavor profile, the one aspect they have in common is their commitment to quality and truly representing their "terroir".


Fontodi 2004 Flaccianello
\$107.00

Billecart Salmon NV Blanc de Blancs
\$69.00

Quintarelli 1999 Valpolicella
\$75.00
[View All Regional Legends »](#)

New Arrivals

Recent additions to our selection include: a great drinking, elegant ten-year old \$19 Bordeaux blend from Friuli, Italy; two wines from one of the world's most unique producers, Josko Gravner; and a baby brunello from Montalcino's hottest producer, Valdicava.


Sant'Elena 1997 Ros di Rol
\$19.00

Gravner 2001 Breg Anfora
\$95.00

Valdicava 2005 Rosso di Montalcino
\$38.00
[View All New Arrivals »](#)

SPOTLIGHT



Recommendations for Summer Sipping

Dear New York Wine Co. Friends, As we sit on the cusp of summer, New York Wine Co. has been exploring some warm weather wine prospects. Each of the following six wines is not only an excellent and precise representation of its old world region, but also seems particularly fitting for a summer of new world social events and gatherings. Enjoy!

Past Spotlights

April 2007
Northern Rhône's Best Value: JL Chave St. Joseph 'Offerus'

March 2007
Smart buys from the southern Rhone

February 2007
The Mystique of Brunello

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Wine Club



WINE CLUB

New York Wine Co.'s Monthly Wine Clubs are the simplest, most exciting way to cultivate your interest in wine. Every month, members receive six bottles of wine—all specifically chosen according to each particular Club's focus—as well as details about the wine, producer, and region.

The Taster's Club

The Taster's Club is ideal for the more casually curious or for those just getting to know the wine world. Monthly selections focus on a wide variety of regions and their terroirs. The average bottle price is \$15-\$20. The cost of shipping, delivery, and/or tax is not included in the Club's price.

 No. of months: 3 Months - \$315.00 Qty: [ADD TO CART](#)

The Aficionado's Club

The Aficionado's Club is designed for the aficionado who is interested in starting a collection. Monthly selections concentrate on cellar-worthy value wines. The average bottle price is \$25-\$35. The cost of shipping, delivery, and/or tax is not included in the Club's price.

 No. of months: 3 Months - \$540.00 Qty: [ADD TO CART](#)

The Collector's Club

The Collector's Club is intended for more seasoned collectors who are interested in adding more diversity to their cellars. The average bottle price is \$50-\$70. The cost of shipping, delivery, and/or tax is not included in the Club's price.

 No. of months: 3 Months - \$1080.00 Qty: [ADD TO CART](#)
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Events

Public Events

We like to keep a full schedule of opportunities to enjoy wine with you. Mark your calendar for upcoming events!

[View Calendar of Events »](#)

UPCOMING EVENTS

The Oenophilia Series



If you crave a more focused, studied wine-tasting, join us the first Saturday of each month. The Oenophilia Series features more formal, sit-down events, which offer tasters both educational and exploratory experiences. In addition to spotlighting a specific sub-region, the Oenophilia tastings will also periodically involve some of the wine world's most interesting and innovative producers, experts, or sommeliers. (Each Oenophilia Series Event is \$75; however, this fee will be applied toward any case purchased during the event.)

Free Tastings



Want to check out what has piqued our interest each week? Stop by New York Wine Co. for our informal Saturday sampler. Join us Saturdays from 11am to 7pm, except the first Saturday of the month.

The Art of Entertaining Series



Learn new twists and age-old secrets of hosting a five-course meal and wine pairings. These interactive and intimate forums investigate a range of topics, all focusing on aspects of gratifying, yet flawless in-home entertaining.

Private Events

Consider our elegant, versatile space as a backdrop for your next intimate gathering, educational event, or larger corporate function. For more information, contact Rob Allen, at (212) 812.3999 or rob@nywineco.com

TOUR OUR SPACE


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About Us

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Our Store



New York Wine Co. has both a conspicuous passion for the classic wines of Europe and a loyalty to quality wines from the world's other notable regions. Our own personal curiosity about wine keeps New York Wine Co.'s selection frequently changing, and our devotion to a wine's characteristics of terroir focuses our selection on producers that create a sense of place. No matter if you're looking for everyday drinking wines, undiscovered specialties, or rare trophy vintages, New York Wine Co.'s warm, enthusiastic approach to wine will suit your tastes.

Contact Us

If you have any questions, please do not hesitate to contact us.

Email: cs@nywineco.com

Telephone: (212) 812.3999

Fax: (212) 608.5526

Street Address:

21 Warren Street

New York, NY 10007

Hours & Directions

Monday-Friday, 10:00am to 7:00pm

Saturday, 11:00am to 7:00pm.

We are closed on Sunday.

We are located in Tribeca, at 21 Warren Street, between Broadway and Church Street. The closest parking garage is Central Parking System, 75 Park Place (corner of West Broadway), 212-732-6637.

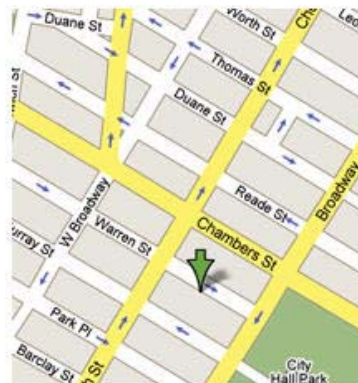
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R, W to City Hall

6 to City Hall

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Attorney for Plaintiff, ARCO INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCO INDUSTRIES, INC.,

Plaintiff,

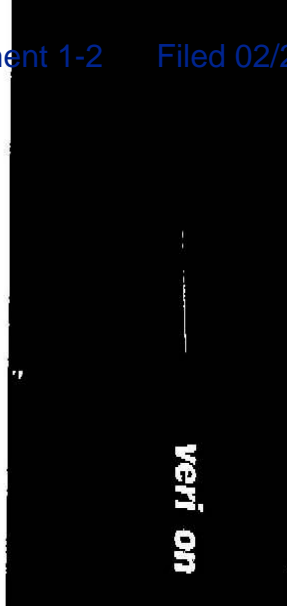
v.

NEW YORK WINE CO. LLC,
ROBERT ALLEN, and,
DERRICK MIZE

Defendants

Case No. 1:08-cv-01999-PKC

Exhibit 6



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INCAIC
OCTOBER 2007
NY 58568

222 Amsterdam Av @W 70th St ----- 212 577-0050
 8th Street Wine Cellar
 28 W 8 @MacDougal St ----- 212 260-9463
 86th Corner Wine & Liquor Co
 536 Columbus Av @W 86th St ----- 212 496-1769

ELI'S MANHATTAN WAREHOUSE INC

1411 3 Av @E 80th St ----- 212 717-1999
 (See Our Display Ad Page 1305)

ELIZABETH & VINE INC

253 Elizabeth @Prince St ----- 212 941-7943
 Enos & Wunderlich 1256 Lex ----- 212 517-6554
 Fifty Fifth Street Liquor Store
 40 W 55 @Avenue Of The Americas ----- 212 246-2323
 Fine Imports 62 W 47 @5th Ave ----- 212 398-8424

FIRST AV WINE & SPIRITS

SUPERMARKET

383 1 Av @E 23rd St ----- 212 673-3600
 Food & Wines From France Inc
 215 Park Av S @E 18th St ----- 212 253-7255
 Fulton Wines & Spirits
 110 Fulton @Dutch St ----- 212 571-2480
 Garnet Wines & Liquors Inc
 929 Lex Av @E 68th St ----- 212 772-3211

Great Sunsan Wine Imports Ltd
 15 Pennsylvania Plz ----- 212 714-2099

Harlem Vintage 2235 8 Av ----- 212 866-9463
 Harry's Liquors 270 W 36 @8th Ave ----- 212 244-5276

Hong Liquor Store Inc
 2616 Bway @W 99th St ----- 212 222-5770

Hudson Wine & Spirits Inc
 165 Hudson @Hubert St ----- 212 431-1010

In Vino Veritas
 1375 1 Av @E 74th St ----- 212 288-0100

International Wines & Spirits
 2903 Broadway @W 113th St ----- 212 280-1850

Is-Wine 24 W 8 @MacDougal St ----- 212 254-7800

J L Wine & Liquors Inc
 60 E 34 @Madison Ave ----- 212 686-8899

Jay's Liquors 1621 St Nicholas Av ----- 212 781-1954

K & D Liquors
 1366 Madison Av @E 95th St ----- 212 289-1818

Kessler Liquors
 23 E 28 @Madison Ave ----- 212 685-7651

Kobrand Corporation
 134 E 40 @Lexington Ave ----- 212 490-9300

Lexington Wine & Liquor
 2010 Lexington Av @E 122nd St ----- 212 348-1313

Madison Ave Liquors Inc
 244 Madison Av @E 38th St ----- 212 338-0004

Madison Avenue Wine
 1793 Madison Av @E 118th St ----- 212 987-0099

Manhattan Plaza Winery Inc
 589 9 Av @W 42nd St ----- 212 695-8170

Marks Wine & Spirits Ltd
 53 Mott @Bayard St ----- 212 962-1932

MISTER WRIGHT INC

Fine Wine & Spirits
 1593 3 Av @89th St ----- 212 722-4564

Moore Brothers Wine Co
 33 E 20 @Broadway ----- 212 375-1575

MORRELL AND COMPANY

1 Rockefeller Plz @W 48th St ----- 212 688-9370

Morrell Wine Store
 1 Rockefeller Ctr @W 48th St ----- 212 981-1106

Murray Hill Wine & Spirits 516 3 Av ----- 212 532-2440

N Y C Wine Company
 167 W 23 @7th Ave ----- 212 647-1875

New York Wine Company
 21 Warren @Church St ----- 212 812-3999

New York Wine Warehouse
 8-05 43 Av 1 C ----- NYC TelNo-212 956-2250

Ninth Avenue Vintner Ltd
 669 9 Av @W 46th St ----- 212 664-9463

Normandie Wines
 1834 2 Av @E 95th St ----- 212 876-1994

Old Columbia Spirits & Wine
 2056 Broadway @W 71st St ----- 212 876-1200

100 Seaborn @Ludlow St ----- 212 388-0770
 79 St Wine And Spirits Corp
 230 W 79 @Amsterdam Ave ----- 212 724-1737
 67 Wine & Spirits Inc
 179 Columbus Av @W 68 ----- 212 724-6767
 Soho Wine & Spirits Ltd
 461 W Broadway @Prince St ----- 212 777-4332
 Stonehaven
 275 Madison Av @E 39th St ----- 212 922-0958

SUSSEX WINE & SPIRITS

www.sussexwine.com

300 E 42 @2nd Ave ----- 212 867-5838

T Edward Wines
 66 W Broadway @Murray St ----- 212 233-1504

The Wine Angel
 115 W 30 @Avenue Of The Americas ----- 212 273-0330

The Wine Angel
 115 W 30 @Avenue Of The Americas ----- 212 627-0330

333 Wine Heaven
 333 3 Av @E 25th St ----- 212 726-0033

Tinto Fino 85 1 Av @E 5th St ----- 212 254-0850

Trader Joes Wine Shop
 138 E 14 @Irving Pl ----- 212 529-6326

Tribeca Wine Merchants Ltd
 40 Hudson @Duane St ----- 212 393-1400

Tribeca Wines
 327 Greenwich @Duane St ----- 212 965-0657

Union Square Wine and Spirits
 140 4 Av @E 13th St ----- 212 675-8100

Uptown Wine Shop Inc
 1361 Lex Av @E 90th St ----- 212 289-6900

VIG 27 119 E 27 @Lexington Ave ----- 212 586-5500

Village Wine & Spirits
 486 Avenue Americas @W 12th St ----- 212 255-0539

Vino 143 E 27 @Park Ave S ----- 212 725-6058

Vino 118 E 28 @Lexington Ave ----- 212 725-6516

Vinovino
 211 W Broadway @Franklin St ----- 212 925-8510

Vintage New York
 2492 Broadway @W 93rd St ----- 212 721-9999

Vintage New York
 482 Broome @Wooster St ----- 212 226-9463

WASHINGTON SQ WINE

& LIQUOR STORE

545 La Guardia Pl @W 3 ----- 212 477-4395

WINDSOR WINE SHOP

474 3 Av @E 32nd St ----- 212 779-4422

Wine Shopper Com 100 Park Av ----- 212 880-2612

Winebow Inc 236 W 26 @7th Ave ----- 212 255-9414

Winesby Com 23 Jones @W 4th St ----- 212 242-5144

World Wine & Spirits
 705 2 Av @E 38th St ----- 646 227-0446

Yarden Inc
 575 Madison Av @E 56th St ----- 212 605-0478

York Wines & Spirits
 1291 1 Av @E 70th St ----- 212 744-5656

Wire Baskets

See

Baskets-Retail

Wire Brushes

See

Brushes

Wire Fence

See

Fence

WIRE FORMING & WORKING EQUIP.

American Cord & Webbing Co Inc

WOMEN'S EXCHANGES

Arleen Bowman Boutique
 353 Bleeker @W 10th St ----- 212 645-8740
 Capital Mercury Shirt Corp
 1372 Broadway @W 37th St ----- 212 764-2455
 Crabtree Ann
 1260 Madison Av @E 90th St ----- 212 996-6495
 Nanette Lepore Boutique LTD
 423 Broome @Crosby St ----- 212 219-8265
 National Society Of Colonial Dames The
 215 E 71 @3rd Ave ----- 212 744-3572
 Olive & Bette's Company Inc
 158 Spring @W Broadway ----- 646 613-8772
 Sylvia 1407 Broadway @W 39th St ----- 212 944-2391
 22nd St Inc 231 W 39 @Fashion Ave ----- 212 398-4205

Women's Specialty Shops

See

Clothing & Accessories-Women

Wood

See

Firewood

Wood Burning & Coal Stoves

See

Fireplaces

Stove-Wood, Coal, Gas, Pellet, Etc.

Wood Carvers' & Sculptors' Tools

See

Sculptors' Equip. & Supplies

Wood Dirs.

See

Firewood

Wood Finishes

See

Paint-Retail

Wood Finishing-Automotive

See

Automobile Seat Covers, Tops & Upholstery

WOOD FINISHING SUPPLIES

ABBOTT PAINT OUTLET INC

214 40 Brooklyn ----- 718 499-6379

La Polla Painting & Wallcovering

350 W 56 @8th Ave ----- 212 489-3501

Wood Flooring

See

Floor Laying, Refinishing & Resurfacing

Floors-Materials & Laying

Lumber

Wood Mouldings

See

Lumber

Moldings

Wood Recycling

See

Recycling Facilities

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Attorney for Plaintiff, ARCO INDUSTRIES, INC.

UNITED STATES DISTRICT COURT
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ARCO INDUSTRIES, INC.,

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Defendants

Case No. 1:08-cv-01999-PKC

Exhibit 7

CALLAN, KOSTER, BRADY & BRENNAN, LLP

COUNSELORS AND ATTORNEYS AT LAW

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January 30, 2008

Via E-Mail: Gtroy@webtm.com
Fax: (802) 425-9061 and
Regular Mail

Gordon E. R. Troy, P.C.
3333 Lake Road
P.O. Box 368
Charlotte, VT 05445

Re: **Arco Industries/New York Wine Warehouse, et. al.**
Our File No.: 100.144460

Dear Mr. Troy:

As you know, my office has been retained to represent New York Wine Co., LLC with regard to the above-referenced matter.

I am writing this letter to respond to your letters dated October 11, 2007, your e-mail dated January 4, 2008 addressed to Mr. Gelfarb, and your January 17, 2008 e-mail.

For the reasons described below, we strongly disagree with, and are surprised by your claim that my client's use of its corporate name "New York Wine Co., LLC" somehow infringes the intellectual property rights of your client.

My client's use of the name New York Wine Co., LLC in no way constitutes infringement of your client's registered trademarks for the service mark "New York Wine Warehouse" or its service mark for "New York Wine Storage Company". My client's good faith use of the corporate name "New York Wine Co., LLC" which incorporates words which are generic, and at most descriptive, does not in any way constitute violations of the Lanham Act, 15 U.S.C. §1114(1) or 1125(a) and (d). Moreover, New York Wine Co.'s conduct does not constitute infringement under the New York General Business Law, or violate any other intellectual property rights claimed by your client.

We note that as part of your client's service mark registration for "New York Wine Warehouse", your client makes no claim to the exclusive right to use "Wine Warehouse" apart from the mark as shown. Similarly, your client's service mark for "New York Wine Storage Company" expressly provides that "no claim is made to the exclusive right to use 'Wine Storage Company', apart from the mark as shown".

Even though your client's service marks may be incontestable due to the passage of five years since their registration, in order to establish infringement, your client is required to establish the key element of likelihood of confusion. In this regard, it must be established "that numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the market place of defendant's mark". Gruner + Jahr USA Publishing v. Meredith Corp., 991 F.2d 1072, 1077 (2d Cir. 1993). For a finding of infringement, a probability of confusion, not a mere possibility, must be found to exist. Gruner + Jahr USA Publishing, supra at 1077, citing, McCarthy, Trademarks, §23:1[C] 23: 2[B].

As you know, the factors that are weighed in determining whether the likelihood of confusion standard has been met are (1) the strength of plaintiff's mark; (2) the similarity of plaintiff's and defendant's marks; (3) the competitive proximity of products; (4) the likelihood that plaintiff will "bridge the gap" and offer a product like defendant's; (5) actual confusion between products; (6) good faith on the defendant's part; (7) the quality of defendant's product; and (8) the sophistication of buyers. Gruner + Jahr USA Publishing, supra at 277, citing, Polaroid Corp. v. Polarad Elec. Corp., 287 F.2d 492 at 495.

While I will not engage in a discussion of all of the Polaroid factors, it is clear that in the matter at hand, the key element of "likelihood of confusion" is absent.

The first factor, the strength of the marks at issue, weighs heavily against any finding of likelihood of confusion. It is indisputable that your client's service marks are extremely weak. The strength of a mark depends on its distinctiveness, or its "origin indicating quality" in the eyes of the purchasing public. 24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 277 F.supp.2d 356 (SDNY 2003). Under the test articulated in Abercrombie & Fitch Co. v. Hunting World, Inc., 357 F.2d 4, 9 (2d Cir. 1976), marks are classified, from weakest to strongest, as (1) generic; (2) descriptive; (3) suggestive; or (4) arbitrary and fanciful.

As noted above, your client's marks are extremely weak and would be classified as generic, or at most descriptive. Because of the weakness of your client's marks, they are entitled only to extremely narrow protection. See, Sports Authority, Inc. v. Prime Hospitality Corp., 89 F.3d 955, 961 (2d Cir. 1996); Kozak Auto Drywash, Inc. v. Enviro-Tech Int'l., Inc., 823 F.supp. 120, 123 (WDNY 1993) (stating that a mark's incontestability does not prevent [a] defendant from questioning the strength of the mark and the scope of protection).

The second factor, the degree of similarity between the marks, also shows that there is no likelihood of confusion. Obviously, our client's corporate name is dissimilar to your client's service marks. The use of the words "New York", which is merely a geographic

description of my client's location, and the generic term "Wine" are simply not entitled to protection.

My client has also acted in good faith in the use of the corporate name "New York Wine Co., LLC". There was no intention by my client to deceive customers into believing that its products or services were or are in any way related to those of your client.

It has been held that wine buyers are sophisticated purchasers. Banfi Products Corp. v. Kendall-Jackson Winery, Ltd., 74 F.supp.2d 188 (EDNY 1999). As such, this factor weighs strongly against any likelihood of confusion.

Additionally, extensive third-party use of the terms "New York" and "Wine" by businesses in the region will also weigh heavily against any finding of infringement. One example of such third-party use is the wine retail store one block from my office called the "New York Wine Exchange". Other examples, among many others, are the "New York

CONCLUSION

Based upon the foregoing, it is our position that our client has not infringed any of your client's intellectual property rights. Our client has not violated any of the Lanham Act Sections that you have cited. Our client has not violated any provision of the New York State General Business Law or any common law rights held by your client.

Accordingly, we respectfully reject your cease and desist letters, and all of the demands contained therein. We will consider this matter now closed. However, if you would like to discuss this matter further, please do not hesitate to contact me.

Additionally, you have alleged in conclusory fashion that your client has evidence of actual confusion. While my client rejects your client's claim that there have been instances of actual confusion, I will review any purported evidence that you may have regarding alleged instances of actual confusion.

This letter is without prejudice to all rights and remedies, all of which are expressly reserved.

Very truly yours,



Michael P. Kandler

MPK/hr